

0-EG

National Endangered Species Network

005487

Supporting the Grassroots Conservation of Endangered Plants, Fish, Wildlife and Habitats

November 16, 1998

Secretary Bruce Babbitt
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Director Jamie Clark
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, D.C. 20240

Bruce Halstead
U.S. Fish and Wildlife Service
1125 16th Street, Room 209
Arcata, California. 95521
VIA FAX (707) 822-8411

Richard Wilson, Director
California Department of Forestry and Fire Protection
P.O. Box 944246
Sacramento, California. 94244-2460

RE: Comments on the Draft EIR/EIS for the Headwaters Forest Acquisition and the PALCO Sustained Yield Plan and Habitat Conservation Plan (HCP). PRT- 828950 and 1137

INTRODUCTION

The National Endangered Species Network ("NESN" or "Network") is a non-profit grassroots conservation project of Social & Environmental Entrepreneurs (SEE) Inc. and receives 501c3 fiscal sponsorship as such. NESN was founded in 1994 and borne out of concern by scientists and wildlife advocates regarding "policy" changes to the federal Endangered Species Act (ESA) and implementation of Habitat Conservation Plans (HCPs) and Incidental Take Permits (ITPs) by the U.S. Department of the Interior, Fish and Wildlife Service (FWS) and U.S. Department of Commerce, National Marine Fisheries Service.

NESN is unique in that the project's primary goal is to strengthen the existing ESA by providing technical and scientific assistance to grassroots organizations and activists that are consumed by the task of challenging proposed and approved HCPs/ITPs and other large scale multiple species conservation programs (e.g. the State of California Natural Communities Conservation Planning Program (NCCP)).

NESN is dedicated to bringing science back into government decision making regarding endangered species conservation at the local, state and federal level. The Network is currently a co-plaintiff in the legal challenge to the Services final "No Surprises" rule (Spirit of the Sage Council, et. al., v. Babbitt, et.al., USDC D.C., Civ. No. 1:98CV01873, Judge Sullivan) and objects to the Services', CDFG and CDF proposed use of "No Surprises" in the Headwaters HCP/ITP and IA for the reasons stated in the referenced lawsuit.

STANDING & INJURIES

NESN has members, a number of which are scientists, academics and students, that reside within or nearby the Headwaters HCP Planning Area and/or visit the area for scientific studies and educational pursuits. These scientists. Such NESN members need to observe terrestrial and aquatic species (e.g. northern spotted owl, marbled murrelet, salmon and other species identified and unidentified in the Headwaters HCP Planning Area) and habitats for their studies and advancement in science, including and conservation biology.

- National Headquarters • 30 North Raymond Avenue - Suite. 303 - Pasadena - California - 91103 - Tel: (626) 744-9932
- Central Valley • 915 L Street - Bldg. C / 347 - Sacramento - CA. - 95814 - Tel: (916) 753-7187 / Fax: (626) 744-9931
- Texas • P.O. Box 41 - Buda - Texas - 78610 - Tele: (512) 223-6082 / Fax: (512) 858-1732

Secretary Bruce Babbitt, DOI, Director Jamie Clark, USFWS, Bruce Halstead, USFWS and Richard Wilson, CDF

RE: Comments on the Draft EIR/EIS for the Headwaters

PER: National Endangered Species Network

Page Two

The proposed Headwaters HCP/ITP and IA with "No Surprises" guarantees would permit the wholesale destruction of thousands of acres of forest and other habitats that would decrease not only the ecosystem that numerous listed and unlisted species depend upon for survival and recovery, but also decrease, limit and preclude our members abilities to enjoy and study the ecosystem in it's current health.

PURPOSE OF THE ENDANGERED SPECIES ACT

The goal and intent of the federal Endangered Species Act (ESA) is "to halt and reverse the trend towards species extinction, whatever the cost." (see TVA v. Hill, and Babbitt v. Sweet Home Chapter (1995) 132 L Ed 2d 597). The Sage Council has found the proposed Headwater HCP and associated documents and agreements fail to meet such goals.

NESN-

1

The U.S. House of Representative Conference Report (No. 97-835, 97th Congress, 2d Session) regarding the Endangered Species Act Amendments of 1982 (pp.29-33) refer to the San Bruno HCP as the paradigm approach to implementing all HCPs to follow. In combination with 50 CFR Parts 13 and 17, the Conference Report clarifies what must "legally" be included in an HCP document in order for U.S. Fish & Wildlife Service to issue an Incidental Take Permit.

- It is the Network's position and request that the entire 211,000-acre Headwaters HCP/ITP planning area, as referenced in the Headwaters Agreement, be acquired and conserved in perpetuity for "We the People" of the California Republic and United States of America for ecological health of our natural heritage. All "public trust lands and natural resources" that are currently privately held by PALCO that are of ecological and cultural significance must be acquired through condemnation or other means that will ensure that the public trust is upheld by our state and federal public trust agencies. The public trust bestowed upon our government by "We the People" must supersede the whims and desires of a corporation hell-bent on private profit through the pillaging of America's natural heritage.

NESN-

2

The Headwaters HCP planning area is comprised of "public trust" natural resources and lands that are not privately "owned" but held in public trust and regulated for "We the People" of the California Republic and United States. The ITP applicant and proponent of the Headwaters HCP, PALCO, did not acquire the land holding with entitlements that had previous permits to log and convert the habitats within the proposed planning area. Therefore, the application for ITPs is inaccurate because the proposed logging activities and "take" is not "incidental to an otherwise lawful activity" (see Sect.10(a)(2)(b) of the ESA) but is planned and deliberate. If the State and Federal permitting agencies approve the applications and issue permits, such agency actions would not only be in violation of the ESA, NEPA, Clean Water Act, Administrative Procedures Act and CEQA, but also our Civil Rights and the Public Trust Doctrine.

NESN-

3

It appears that government agencies and Representatives has acted against "We the People" and their public trust responsibilities when entering into Agreements (contracts) and passing legislation that would approve of the destruction of our natural resources within the Headwaters planning area. The State and Federal Government agencies and representatives have already made a decision regarding Headwaters - such decisions through entering into agreements and contracts are "pre-decisional" and unlawful.

NESN-

4

The Headwaters Agreement was signed and entered into on September 28, 1996 and with a pre-decisional agreement to issue Incidental Take Permits ("Pre-Permit Application Agreement"), that does not clearly identify the correct date on implementation (two dates occur on this document - February 27,

Secretary Bruce Babbitt, DOI, Director Jamie Clark, USFWS, Bruce Halstead, USFWS and Richard Wilson, CDF
 RE: Comments on the Draft EIR/EIS for the Headwaters
 PER: National Endangered Species Network
 Page Three

1998 and September 28, 1996) (see Appendices A-C). Clearly the Network and public have been excluded from this government decision making process. NESN and public have been severely harmed by such Agreements and that government agencies and administrators that entered into such pre-decisional contracts which indicate that such agencies have over stepped their administrative authorities and have acted arbitrary and capriciously in such decisions that were made without using the best scientific data. This type of political scheming is clearly unlawful under 18 U.S.C. 51001.

NESN-
4
CON.

The draft EIR/EIS for the Headwaters HCP does not provide an adequate range of alternatives that would include an environmentally superior alternative - which we believe would be the acquisition of the entire 211,000-acres of habitats within the planning area and no "take" of sensitive, rare and endangered species. We request that this alternative be included in the final EIR/EIS.

NESN -
5

- The draft EIR/EIS is very difficult to read and comprehend to lay people or even the more experienced person. It is full of assumptions and unknowns regarding environmental impacts and effects on public trust natural resources, including habitats, watersheds, listed and unlisted species. CEQA, NEPA and the ESA require that the environmental documents be written in a way that is easily understandable and readable - these documents are not.

Rather than stating assumptions throughout the documents, the Network requests that it be stated that "it is unknown" what the environmental effects are or are expected to be. Doing so would provide less confusion to the interested public and possibly the courts, when the referenced HCP/ITP is legally challenged. We request that the public trust agencies review the recent court finding and decision, of August 1998, regarding the Alabama Beach Mouse HCP/ITP (Sierra Club, et. al. v. Bruce Babbitt, et. al., USDC Southern District of Alabama, Case No. 97-0691-CB-C) regarding the adequacy of data and decision making for HCP/ITPs and IAs.

NESN -
6

It appears that a Population Viability Analysis (PVA) was performed for the marbled murrelet but not for the other listed and unlisted species proposed for "take" through the HCP ITPs and IA. According to NESN's scientific advisor, Dr. K. Shawn Smallwood,

NESN -
7

"[t]he PVA performed for the Marbled Murrelet is in the HCP, but its ranges of perimeter values are too narrow. More importantly, risk assessments were performed for none of the other species in their lists A & B. Also the term habitat is used improperly throughout the HCP and EIR, and the GIS maps are based on these so-called habitats. The core of the HCP is fundamentally flawed by defining habitats from SYP timber stand types rather than from the biological points of view of the species. Also, [there is] no adaptive management for the species, no ecosystem analysis, no uncertainty analysis, no scientific monitoring plan... This HCP is a turkey."

The ESA requires that all unlisted species included in an HCP be treated as if listed. Although Section 10(a) provides an exception to the prohibitions of "take" that are defined in Section 9 of the ESA, the Network reminds the Services that Section 10(a) does not provide an exception to the species recovery requirements found in Section 4 and 7 or the overall goal of the ESA.

The Service must provide a Recovery Plan and implementation of such plans for each of the listed and unlisted species identified in the PALCO Headwaters HCP prior to plan approval and ITP issuance to not only ensure that the proposed "take" of species does not reduce the likelihood of species recovery, but

NESN -
8

Secretary Bruce Babbitt, DOI, Director Jamie Clark, USFWS, Bruce Halstead, USFWS and
Richard Wilson, CDF
RE: Comments on the Draft EIR/EIS for the Headwaters
PER: National Endangered Species Network
Page Four

also to provide the public with scientific substantiation that clearly demonstrates that the loss of habitat and decrease in species populations, throughout their U.S. range and distribution, will in fact "halt" and be "reversed." PVA's must be performed on each species identified.

NESN-
8
CON

The Services must use all methods and procedures in furtherance of the goals of the act to demonstrate that the species willing fact be able to recovery. Therefore, NESN recommends that the Services also use "A General Stochastic Model for the Prediction of Biodiversity Losses Based on Habitat Conversion" (see attachment - H. Koopowitz, A. Thornhill and M. Andersen, June 1994, Vol. 8, No. 2 Conservation Biology, pp 425-438) or other acceptable scientific methods that are current and adequately proven to provide a method to access biological impacts.

NESN-
9

In addition, to the stated problems regarding species population status reports and risk assessments, the Network requests that the Services clearly identify to the public in the HCP documents the percentage of GIS map accuracy and what portions of the HCP planning area as mapped have been ground truthed, including the margin of error utilized, known and expected. It is very easy for the agencies to ignore or overlook the fact that GIS maps are inaccurate and inadequate in identifying habitat areas and species locations by scale - it is virtually impossible for the public to derive adequate or accurate information from the GIS maps included in the HCP documents because the scale is so small. NESN requests that the Services require an appendices that includes all meta-data used in the compilation and creation of the GIS maps, including the date of the data and a gap analysis.

NESN-
10

Furthermore, the Services need an accurate and up-to-date status report on each of the species proposed for "take" in the associated Headwaters HCP documents AND throughout the species range and distribution. Such assessments and status reports should include identification of all HCP/ITPs and Take Authorization Agreements in California, Oregon, Washington, Idaho and Montana for the northern spotted owl and salmon species. The Services must assess and identify the total ramifications of the agency action in concert with other approved and proposed agency action not only within the Headwaters HCP Planning Area, but throughout the species range and distribution in the United States. Hundreds of thousands of acres of forest habitats and others are being approved for logging and other ecologically destructive commercial activities throughout the Pacific Northwest region and into Canada, thus requiring the Services to take a hard look at the cumulative and collateral effects of their agency actions on the species proposed for "take" in the Headwaters HCP.

NESN-
11

The Network requests that the agencies seriously consider our comments and take the corrective actions necessary to ensure the protection of listed species and ecosystems upon which they depend within the Headwaters planning area. Please note that our additional comments will follow. We ask that your agencies and departments include these comments in the final EIR/EIS and include the Network on the mailing and distribution list for all documents and notices regarding the Headwaters HCP Planning Area. Thank you.

For the wild Earth,

Leeana Klippstein

Leeana Klippstein
Executive Director
National Endangered Species Network